

**Case C-335/21**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

27 May 2021

**Referring court:**

Juzgado de Primera Instancia n.º 10 *bis* de Sevilla (Court of First Instance No 10 bis, Seville, Spain)

**Date of the decision to refer:**

24 May 2021

**Applicant:**

Vicente

**Defendant:**

Delia

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**Subject matter of the main proceedings**

Action for the recovery of fees – Lawyers’ fees for services to clients – Determination of lawyers’ fees according to an indicative scale set by a bar association – Order of the Registrar concerning fees – Application to the court for review of that order

**Subject matter and legal basis of the request for a preliminary ruling**

Directive 93/13/EEC – Unfair terms in consumer contracts – Contract for the provision of legal services – Legal proceedings for the recovery of lawyers’ fees – Procedure that restricts the scope for the courts to examine of their own motion whether the terms in a consumer contract are unfair – Directive 2005/29 – Unfair business practices

## Questions referred

1. Is a summary procedure for the recovery of a lawyer's fees, in which the court is unable to examine of its own motion whether the terms in the consumer contract are unfair, since the procedure does not provide for the court to intervene at any point unless the client challenges the claim and one of the parties subsequently applies to the court for a review of the final decision of the Letrado de la Administración de Justicia (Registrar), compliant with *Directive 93/13 and the principle of the effectiveness of the directive, in conjunction with the right to an effective remedy in Article 47 of the Charter [of Fundamental Rights of the European Union]*?
2. Is the fact that, in this type of summary procedure, any consideration of the unfairness of terms by the courts, whether of their own motion or on the application of a party, takes place in the context of an application for review of the decision of a non-judicial body such as the Registrar, and that the courts must in principle restrict their consideration solely to the subject matter of the decision and may not examine any evidence other than the documentary evidence already submitted by the parties, compliant with *Directive 93/13 and the principle of the effectiveness of the directive, in conjunction with the right to an effective remedy in Article 47 of the Charter*?
3. Must a term in a contract between a lawyer and a consumer such as the term at issue, which provides specifically for payment of fees in the event that the client discontinues proceedings before the case is concluded or reaches an agreement with the entity either without his or her legal team's knowledge or against its advice, be deemed to fall within the terms of *Article 4(2) of Directive 93/13*, on the grounds that it is a main contract term that concerns the subject matter of the contract, in this case, the price?
4. If the answer to the previous question is in the affirmative, can that term, which fixes the fees by reference to a fee scale set by a bar association which establishes different rules depending on the specific circumstances and which was not mentioned in the prior information, be considered plain and intelligible in accordance with the terms of the aforesaid *Article 4(2) of Directive 93/13*?
5. If the answer to the previous question is in the negative, can the inclusion in a contract between a lawyer and a consumer of a term such as the one at issue, which fixes the lawyer's fees purely by reference to a fee scale set by a Bar association which establishes different rules depending on the specific circumstances and which was not mentioned in the quotation for services or in the prior information, be deemed an unfair business practice under the terms of *Directive 2005/29*?

### **Provisions of EU law relied upon**

- Article 47 of the Charter of Fundamental Rights of the European Union.
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, recitals 21 and 24, Articles 3 and 4, Article 6(1) and Article 7(1).
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Article 2(1)(d) and Articles 5, 6, 7 and 11.

### **Provisions of national law relied upon**

- Ley de Enjuiciamiento Civil (Code of Civil Procedure; 'LEC').

Pursuant to Article 35 of the LEC, lawyers may demand payment of fees for their services from the party they represented. Once the demand for payment has been made, the letrado de la Administración de Justicia (Registrar) will serve notice on the debtor ordering him or her either to pay the amount claimed or to challenge the claim. In the event of a challenge to the claim, the Registrar is responsible for determining the lawyer's fees by means of an order, with a warning that enforcement action will be taken in the event of non-payment. An application may be made to the court for review of the order.

- Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales (Law 2/1974 of 13 February 1974 on Professional Bodies) as amended by Law 25/2009 of 22 December 2009 (BOE No 308 of 23 December 2009).

This Law stipulates that professional bodies may not establish indicative fee scales or other guidelines on professional fees, without prejudice to the fourth additional provision. This additional provision allows professional bodies to draw up indicative criteria for the sole purposes of taxation of costs and recovery of lawyers' fees.

- Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española (Royal Decree 658/2001 of 22 June 2001 adopting the General Statute of the Spanish Bar) (BOE No 164 of 10 July 2001), in the version applicable to the facts of the main proceedings.

The General Statute of the Spanish Bar, in the version applicable to the facts of the main proceedings, establishes that lawyers are entitled to receive appropriate payment for their services, and to reimbursement of their costs. The amount of the fees is to be freely agreed by the client and the lawyer, having regard to ethical standards and rules on unfair competition. The statute also provides that, in the absence of any express agreement to the contrary, when setting fees regard may be had, as a guide, to the indicative scales established by the Bar association for the area where the lawyer in question is practising; in all cases, such scales will

supplement any agreement and will apply where costs are awarded against the other party.

- Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la defensa de los consumidores y usuarios y otras leyes complementarias (Royal Legislative Decree 1/2007 of 16 November 2007 adopting the consolidated text of the General Law on Consumer Protection and other ancillary laws) (BOE No 287 of 30 November 2007), in the version in force at the material time.

Article 20 of this Law provides that business practices must include at least the following information, if not already apparent from the context: the full final price, total price, with a breakdown, where appropriate, of the amount of any increases or discounts that may be applicable, expenses that may be passed on to the consumer or user. In other cases where, in view of the nature of the goods or services, the quotation for services cannot provide an exact price, information must be provided on the method of calculation to enable the consumer or user to confirm the price. Likewise, where, for objective reasons, any additional costs to be passed on to the consumer or user cannot be calculated in advance, the consumer or user must be informed of the existence of those additional costs and be provided with an estimate of the amount, where known.

Article 60 of that Law provides that, before entering into a contract, the seller or supplier must provide the consumer or user with sufficient, relevant and truthful information, in plain, intelligible language, on the key features of the contract, in particular on the legal and financial terms and conditions and on the goods or services to which the contract applies.

### **Brief summary of the facts and procedure**

- 1 On 9 February 2017, Delia ('the client') and the lawyer, Vicente, ('the lawyer') entered into a contract for the supply of legal services according to which the lawyer would claim repayment of certain sums paid to a bank by the client pursuant to certain unfair terms.
- 2 That contract for the supply of legal services included a term which established that the client undertook to follow the lawyer's instructions and that, if the client discontinued proceedings for any reason before the case was concluded, or reached an agreement with the bank without the lawyer's knowledge or against his advice, she would have to pay the lawyer a sum to be calculated in accordance with the Scale for the Taxation of Costs established by the Seville Bar Association in connection with the claim that had been brought.
- 3 Before the contract was signed, the lawyer had given the client a manuscript note containing details of the terms and conditions regarding the price for the legal services. There is no indication that the note provided specific information on the

term in question. The client also states that she contacted the lawyer via an advertisement on Facebook, which made no mention of the term either.

- 4 On 22 February 2017 the lawyer submitted an out-of-court claim to the bank prior to lodging a claim with the court.
- 5 On an unspecified date, the client received a reply from the bank, dated 2 June 2017 and sent to her home address, in which the bank accepted the out-of-court claim and offered to repay her the overpayment of EUR 870.67.
- 6 On 12 June 2017 the lawyer filed an application with the referring court for repayment of the amounts overpaid by the client under the unfair terms contained in the agreement with the bank.
- 7 The client decided to accept the bank's offer.
- 8 On 13 June 2017 the lawyer sent the client a letter via bureaufax in which he said that, following their conversation that morning, he reiterated his opposition to her accepting the bank's offer even though a claim had already been lodged with the court.
- 9 On 25 September 2017 a document was lodged with the referring court stating that the client had discontinued the court action. The proceedings were therefore terminated.
- 10 On 13 November 2017 the lawyer lodged an action for the recovery of fees with the referring court in the sum of EUR 1 105.50 plus value added tax (VAT), giving a total of EUR 1 337.65. The sum was calculated in accordance with a rule in the fee scale established by the Seville Bar Association.
- 11 The client, assisted by a duty lawyer, challenged the fee claim on the grounds that the fees were not due. Notice of the challenge was served on the lawyer, who did not submit any arguments in the time allowed. On 15 October 2020 the Registrar made an order in which he dismissed the challenge, fixed the amount payable to the lawyer at EUR 1 337.65, and stipulated a payment period of 5 days, warning that enforcement action would be taken in the event of non-payment. The client lodged an application for review of the order with the referring court. The application was declared admissible and notice was served on the lawyer to enable him to challenge the application. The lawyer filed a written challenge seeking the dismissal of the client's application and an award of costs against the client.
- 12 The referring court has questions concerning the outcome of this application and has decided to make this reference for a preliminary ruling.

### **Main arguments of the parties to the main proceedings**

- 13 The client argues that her contract with the lawyer is unfair because, amongst other things, it contains a term which provides that, if the case is discontinued, the fees are to be calculated in accordance with a fee scale. She adds that the contract does not reflect the information she was given by the lawyer before the contract was signed, because he told her that the fees would be 10% of the sum received, and she has already paid that sum. The client also contends that the disputed term is not applicable because proceedings were not actually discontinued, since the claim did not get as far as being admitted to process. She also argues that the lawyer filed the claim purely in order to obtain higher fees. She is therefore applying to have the order by the Registrar set aside and for a ruling that the fees claimed by the lawyer are not due.
- 14 The lawyer argues that there are no unfair terms, that he advised the client by bureaufax of the consequences of reaching an agreement on her own with the bank, that the claim was lodged with the court before the client reached an agreement with the bank, and that he had borne the cost of preparing the legal claim and other costs. He is therefore seeking the dismissal of the client's application and an award of costs against her.

### **Brief statement of the reasons for the request for a preliminary ruling**

- 15 The case raises both procedural and substantive issues.
- 16 In terms of the procedural issues (addressed in the first and second questions referred), in Spain there are various routes by which lawyers can take legal action to recover the fees owed to them by their clients for services provided in previous legal proceedings; one of those routes is what is known as an action for the recovery of fees.
- 17 An action for the recovery of fees is a summary procedure offering limited safeguards, the sole purpose of which is to obtain an order requiring the lawyer's client to pay the lawyer the outstanding fees or risk becoming the subject of enforcement action. The procedure is conducted by the Registrar who, according to the case-law of the Spanish Tribunal Constitucional (Constitutional Court) and the judgment of the Court of Justice of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126), does not exercise judicial functions. In an action for the recovery of fees, the Registrar assesses whether the fees are a proper reflection of the professional services provided by the lawyer, decides on the lawyer's rights against the party who engaged the lawyer to represent him, and determines the amount owed.
- 18 An action for the recovery of fees may concern contracts to which Directive 93/13 applies, given that, according to the judgment of the Court of Justice of 15 January 2015, *Birutė Šiba* (C-537/13, EU:C:2015:14), contracts between lawyers and their clients are covered by that directive. However, the procedure is configured in such

a way that the courts may never get to examine the contract. The courts will intervene only if the client challenges the fee claim and one of the parties applies to the courts for a review of the Registrar's decision on that challenge. The procedure does not therefore provide at any point for the courts to examine of their own motion whether the terms of the contract are unfair.

- 19 Although the case-law of the Court of Justice enshrines the requirement for the courts to examine of their own motion whether a term is unfair as soon as they have sufficient factual and legal information, the particular characteristics of the procedure for the recovery of fees require some clarification in this regard. Those particular characteristics are as follows: the Registrar is not a judicial body; the proceedings are summary proceedings; and the courts' involvement is limited to the final stage of proceedings and arises only where the client opts to challenge the fee claim and one of the parties then decides to lodge an application for review of the order made by the Registrar. It should also be noted that such a situation would usually entail an examination of substantive issues such as the nature of the disputed term, the level of information provided, or the extent to which the contract is a pre-formulated standard contract; but it is difficult to examine these types of issues during the final stage of summary proceedings, where the grounds for challenge and the scope to offer evidence are very limited.
- 20 Furthermore, although it is true that the client could subsequently commence declaratory proceedings in order to claim that the terms of his contract with the lawyer were unfair, directing the client down this route, which necessarily requires legal representation and may result in an award of costs if the application is dismissed, would not appear to be consistent with the principle of effectiveness in Directive 93/13. Similarly, with regard to the enforcement procedure for the collection of fees, once the action for the recovery of fees has been concluded, the commencement of enforcement action, in which the courts are indeed involved, is dependent on the lawyer (and it may be that the client makes the payment voluntarily, and there is no need even to commence enforcement proceedings); moreover, there is no provision under the enforcement procedure for the consumer to argue that the terms are unfair.
- 21 As we know, in the order of the Court of Justice of 25 October 2018, *Elena Barba Giménez* (C-426/17, EU:C:2018:858), the Court ruled that 'in the context of proceedings which come under the jurisdiction of the Registrar, such as the main proceedings, it is for the court with power to enforce the debt to examine — if necessary, of its own motion — whether a term in the contract between a court agent or a lawyer and his client is unfair'. However, this statement was based on what was said in the judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126), although that judgment appears to draw a different conclusion. The focus of the *Margarit Panicello* judgment would seem to be on identifying which court would have jurisdiction to make the reference for a preliminary ruling, but it does not seem to conclude that the procedure for the recovery of fees is compliant with EU law because it allows the courts to review the unfairness of terms at the enforcement stage. In this regard, the Court of

Justice has held on several occasions that the question of unfairness should be examined before enforcement action is taken against a consumer [see, for example, *Profit Credit Polska* (C-176/17, EU:C:2018:711), paragraphs 44, 61 to 64 and 71].

- 22 In view of all the above considerations, the question arises as to whether the procedure for the recovery of fees is compliant with Directive 93/13 and the principle of effectiveness enshrined therein, in conjunction with the right to an effective remedy established by Article 47 of the Charter of Fundamental Rights of the European Union.
- 23 In terms of the substantive issues (addressed in questions three to five of the questions referred), it is necessary to clarify the nature of the term in the contract between the lawyer and the client which determines the fees payable in the event that the client discontinues proceedings for any reason before the case is concluded or reaches an agreement with the bank without her lawyer's knowledge or against his advice.
- 24 If the Court of Justice rules that, when deciding an application for review in the course of an action for the recovery of fees, national courts may examine whether the terms are unfair, the question then arises as to whether the disputed term falls within the scope of Article 4(2) of Directive 93/13, as interpreted by the Court of Justice.
- 25 The disputed term could be seen as an indemnifying or penalty clause rather than a clause that directly concerns the price, because it addresses a specific situation, namely the case where the client discontinues proceedings once they have been commenced, or unilaterally reaches an agreement with the bank. If this is deemed to form part of the price, the term could be deemed unfair if it has not been drafted in plain, intelligible language. The nature of the term will therefore determine the type of examination to be undertaken and the form of the review to which it may be subject.
- 26 If the disputed term is considered to fall within the scope of Article 4(2) of Directive 93/13, then, in order to resolve the dispute, one has in turn to determine whether the term can be considered plain and intelligible. This question arises because, in the present case, the term does not establish a precise amount, a percentage or a calculation method, referring instead to the indicative scale drawn up by a Bar association.
- 27 These scales were formerly approved by the Bar associations. Following the amendment introduced by Law 25/2009, the Law on Professional Bodies has prohibited the use of indicative fee scales or other guidelines on professional fees other than for purely indicative purposes in judicial proceedings for taxation of costs and recovery of fees; in such proceedings the LEC provides for an opinion to be sought from the bar association on the appropriateness of the lawyers' fee claims. Under the General Statute of the Spanish Bar as it applied when the

contract between the client and the lawyer was signed, in the absence of any express agreement, in setting fees regard was to be had to the fee scales, although that contravenes the amendment to the Law on Professional Bodies introduced by Law 25/2009. In the present case, as provided for in the contract between the client and the lawyer, the lawyer has used the scale to set his fees in a situation where the client has discontinued proceedings or concluded an agreement with the bank without her lawyer's knowledge or against his advice.

- 28 However, there is no indication that the lawyer informed the client of the contents of the disputed term, since there is no mention of it in the manuscript note he provided to the client, nor is there any clear reference to in the contract they signed. Nor has the scale been shown to be in the public domain, which would have enabled the client in this case to access it. Moreover, the wording of the fee scale is considered to be unclear. It does not specify the basis on which the lawyer's fees will be calculated and it refers to various rules, the choice of which rests with the lawyer. Therefore, while it may not be possible to fix the precise amount at the time the contract is signed, there should be certain minimum requirements in terms of establishing the method of calculation which would give the client an idea of the approximate amount of the fees he or she would have to pay.
- 29 As the Court of Justice has declared in various judgments, such as that of 15 March 2012, *Jana Pereničová* (C-453/10, EU:C:2012:144), a lack of transparency does not automatically mean that a term is unfair within the meaning of Article 3(1) of the directive. Moreover, a finding that a commercial practice is unfair is one element, amongst others, on which the court with jurisdiction can base its assessment of the unfairness of the terms in accordance with Article 4(1) of Directive 93/13.
- 30 Accordingly, we believe it is appropriate to ascertain whether a term in a contract between a client and a lawyer which fixes the lawyer's fees by reference to a fee scale established by a Bar association can be considered an unfair commercial practice for the purposes of Directive 2005/29 where there has been no mention of the term in the quotation for services or in the prior information.